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IN THE

Supreme Court of the United States

October Term, 1945

No. 517

D. A. SCHULTE, INC.,

Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated.

Respondent.

RESPONDENT'S BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the District Court is reported at 53 Fed. Supp. 844 (R. 309-14).

The majority and dissenting opinions of the Circuit Court of Appeals are reported at 150 Fed. (2d) 694 (R. 322-328).

Jurisdiction

The decision of the Circuit Court of Appeals was rendered July 20, 1945. An order, upon stipulation of the parties, was made by the said Court staying the mandate until October 20, 1945, pending the filing of a petition for writ of certiorari.

Petition for writ of certiorari was filed October 17, 1945, and was granted November 19, 1945 (R. 340).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C., Section 347 (a); 8 F. C. A., Title 28, Section 347 (a).

Statement

Respondent suing on behalf of himself and nineteen others, brought this action under Sec. 16 (b) of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Section 216 (b) to recover amounts claimed to be due them under Section 7, 29 U. S. C., Section 207 because of the failure of the petitioner, their employer, to pay them overtime wages from October 29, 1938 to February 5, 1942, for their services as maintenance employees in petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City.

After the decision of this Court in *A. B. Kirshbaum* v. *Walling*, 316 U. S. 517, 524, June 1, 1942, holding that the Act applied to maintenance employees of a building where the tenants of a building are engaged principally "in the production of goods for interstate commerce" and after the decision of this Court in *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572, June 8, 1942, holding that in view of the mandatory character of the statutory language, an employer who failed to pay the statutory overtime pursuant to Section 7, 29 U. S. C. A. Section 207, became automatically liable for "an additional equal amount as liquidated damages" under Section 16 (b) 29 U. S. C. A. Sect. 216 (b), the employees at petitioner's building through two representatives, demanded that the petitioner pay them the unpaid overtime compensation and an equal amount as liquidated damages (R. 29, 39, 276). Petitioner denied liability on the ground that the tenants in its build-

ing were principally "contractors who furnished labor rather than making any material for interstate commerce" (R. 275). For approximately two months it refused to pay. Respondents having threatened suit (R. 29, 277), it offered to pay all the overtime compensation without the liquidated damages. The respondents accepted the sums of money tendered to them as the full overtime compensation. There was no dispute as to the accuracy of the amounts for the unpaid overtime compensation as alleged in the formal releases which the respondents executed upon receipt of payment (R. 39). The releases acknowledged receipt of the specified sum as "payment in full of all further claims" under the Act (R. 279, 281). Prior to the acceptance of said sums, respondent had spoken by telephone to "some woman" in the Wage & Hour Division and to his council chairman from the Union as to what his rights were (R. 25). The respondent had not consulted with any attorney (R. 25). About seven months thereafter, this action was instituted. The District Court upheld affirmative defenses of accord and satisfaction and releases and dismissed the complaint (R. 314), 53 F. Supp. 844.

The Circuit Court of Appeals reversed the District Court (R. 322) and held (1) that the releases herein were ineffective to bar the action (R. 232) and that (2) that the defense of accord and satisfaction herein was insufficient to bar the action (R. 325) and (3) that the petitioner was liable under the Act as to the years 1940, 1941 and part of 1942 (R. 326).

Questions Presented

The questions presented are:

1. Whether, in an action by employees for their statutory liquidated damages, the Fair Labor Standards Act of 1938 (29 U. S. C., Section 201 *et seq.**) prohibits the de-

* C 676, 52 Stat. 1060, hereinafter referred to as the "Act".

fenses of Release, Accord and Satisfaction, and Compromise and Settlement of claims for statutory liquidated damages under Section 16 (b) of the Act (29 U. S. C., Section 216 (b)) based on a dispute between an employer and its employees with respect to coverage under the Act.

2. Whether building maintenance employees are entitled to the benefits of the Act where it is found that the tenants occupying a substantial portion of a loft building are engaged in the production of goods for interstate commerce.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*) are set out in the Appendix.

ARGUMENT

POINT I

Considerations of Paramount Public Policy Dictate that Release, Accord and Satisfaction, and Settlement and Compromise, are not Good Defenses to an Action by an Employee to Recover Liquidated Damages under the Fair Labor Standards Act.

A.

The liability for liquidated damages under Sec. 16 (b) is a mandatory liability regardless of the nature of the violation.

Section 16 (b) of the Act insofar as here applicable reads as follows:

> Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to

> the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

The mandatory character of the liability for liquidated damages under Section 16 (b) regardless of the nature of the violation has been clear since *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572 (1942) aff'g. 126 F. (2d) 98 (C. C. A. 4, 1942). The Circuit Court of Appeals had there said:

> Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the Courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the section appears to be mandatory and virtually all of the Courts have so construed it. The use of the word "willful" in Section 16 (a) defining criminal liability under the Act and its omission in Section 16 (b), defining civil liability would seem to indicate that the employer's good faith is immaterial under Section 16 (b). (126 F. (2d) 110 111.)

In affirming, this Court held that "liquidated damages were mandatory on the courts regardless of the good faith or the reasonableness of his attitude."

In *Rigopoulos* v. *Kervan*, 140 F. (2d), 503 (C. C. A. 2) the Court stated as follows:

> Thus the overtime compensation was paid long after it was due. Section 7 of the Act, 29 U. S. C. A., Sec. 207, plainly contemplates that overtime compensation shall be paid in the regular course of employment and not accumulated beyond a regular pay day. See *Lofton* v. *Seneca Coal & Coke Co.*, 136 F. (2d) 359, 363 (C. C. A. 10), Cert. denied October 18,

1943. Hence the failure to pay it when due, was a violation of Sec. 7, which rendered the employer "liable", as declared in Section 16 (b), not only for unpaid overtime compensation but also for liquidated damages in an additional equal amount. This is a single and entire liability.

It is not discharged *in toto* by paying one-half of it. The liquidated damages provision has been held to be mandatory on the court regardless of the good faith of the employer or the reasonableness of his belief that no overtime compensation was owed. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 582-3; *Lofton* v. *Seneca Coal & Coke Co.*, *supra*. It is alleged that such a construction of the statute produces too harsh a result; but the harshness is inherent in the legislation. We see no escape from the statutory language.

Thus the respondent here was automatically entitled to liquidated damages unless a release, and an accord and satisfaction were good defenses to this action.

B.

The public policy underlying legislation, prescribing in the public interest minimum wage and maximum hour standards for the benefit of wage earners forbids a release, an accord and satisfaction, and a settlement or compromise of any part of the sums required to be paid by the employer to the employee.

The public policy underlying the Fair Labor Standards Act has been very recently enunciated by this Court in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 89 L. ed. 876:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute

> was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contract on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce . . .
>
> It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living "necessary for health, efficiency and general well-being of worker" and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.

In *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590 (1944), this Court stated as follows:

> These provisions, like the other portions of the Fair Labor Standards Act are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the right of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others. These are the rights that Congress has specially legislated to protect.

Thus, agreements of release, waiver, compromise and settlement, or accord and satisfaction have uniformly been held unavailing as defenses to action by employees to recover any part of sums required to be paid by them under paramount provisions of law enacted for the public welfare *U. S.* v. *Morley Constr. Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. sub nom. *Maryland Casualty Co.* v. *U. S.*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642, 171 Pac. 1037; *City of Glendale* v. *Coquat*, 48 Ariz. 478, 52 P. (2d) 1178; *Goebel* v. *Elliot*, 178 Wash. 444, 35 P. (2d) 44; *Cato* v. *Grendel Cotton Mills*, 132 S. C. 454, 129 S. E. 203; *Montague's Adm'r* v. *Massey*, 76 Va. 307; *Kline* v.

State of New York, 93 N. Y. 291; *Wright* v. *State*, 223 N. Y. 44; *Clark* v. *State*, 142 N. Y. 101; *Pitt* v. *Board of Ed.*, 216 N. Y. 304.

The doctrine has been well expressed in *Larson* v. *Rice*:

> It is undoubtedly a general rule that private controversies between individuals *sui juris* may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled, and that the other gave up rights to which he was fully entitled; this on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not a wholly private concern. It was affected with a public interest. * * * The statute was not therefore intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage-earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wageearner, it must follow that any contract or settlement of a controversy arising out of a failure to pay the fixed minimum wage * * * is voidable, if not void * * *. Our opinion is that it is such a contract as the courts are not required to enforce, and that it would be against the policy of the statute so to do (171 Pac. 1037, 1039-1040).

This same principle has been applied in cases involving the Fair Labor Standards Act. The courts have repeatedly struck down as inconsistent with the public interest, agreements between employers and employees whereby employees accept sums less than the full statu-

tory amounts which the Act prescribed, *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 89 L. ed. 876, *Fleming* v. *Post*, 146 F. (2d) 441, *Campbell* v. *Mandel Auto Parts*, 31 N. Y. Supp. (2d) 656, aff'd 264 App. Div. 701. See also *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7, 1941); *Birbalas* v. *Cuneo Printing Industries, Inc.*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Johnson* v. *Dierks Lumber Co.*, 130 F. (2d) 115 (C. C. A. 8, 1942); *Carleton Screw Products* v. *Fleming*, 126 F. (2d) 537, 541 (C. C. A. 8, 1942); *Hutchinson* v. *Barry*, 44 F. Supp. 823 (D. Mass. 1942); *Wilkinson* v. *Noland, Inc.*, 40 F. Supp. 1009 (E. D. Va. 1941); *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D., N. Y. 1943), aff'g 140 F. (2d) 506 (C. C. A. 2, 1943); *Hall* v. *Smith*, 5 Wage Hour Rept. 637, 6 Labor Cases par. 61, 180 (E. D. Ky. 1942); *Travis* v. *Ray*, 41 F. Supp. 6 (E. D. Ky. 1941); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn. 1943); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn. 1943); *Cudahy Packing Co. of Ala.* v. *Bazquos*, 15 So. (2d) 720 (Sup. Ct. Ala. 1943); *U. S.* v. *Johnson*, 6 Wage Hour Rept. 1065 (W. D. N. Y. 1943).

In *Fleming* v. *Warshawsky*, the Circuit Court of Appeals held that the releases were invalid.

> The court found that they were obtained voluntarily and without coercion. In our view of the matter, the manner in which they were obtained is immaterial. * * * Defendants concede that an agreement, in advance of employment, to accept less than permitted by law would render nugatory the objectives of the Act. We think precisely the same result would follow if the employer, by agreement with its employees, be permitted to pay less than the Act prescribes. Waivers in advance of employment are no different in substance or effect than waivers of back pay for past employment. * * * In each situation, the statutory requirements and the purposes of the legislation are ignored (123 F. (2d) 622, 626).

In *Rigopoulous* v. *Kervan*:

> Thus the overtime compensation was paid long after it was due. Section 7 of the Act, 29 U. S. C. A., Sec. 207, plainly contemplates that overtime compensation shall be paid in the regular course of employment and not accumulated beyond a regular pay day. See *Lofton* v. *Seneca Coal & Coke Co.*, 136 F. (2d) 359, 363, (C. C. A. 10), cert, denied October 18, 1943. Hence the failure to pay it when due, was a violation of Sec. 7 which rendered the employer "liable", as declared in Section 16 (b) not only for unpaid overtime compensation but also for liquidated damages in an additional equal amount. This is a single and entire liability.
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> It is not discharged *in toto* by paying one-half of it. The liquidated damages provision has been held to be mandatory on the court regardless of the good faith of the employer or the reasonableness of his belief that no overtime compensation was owed. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 582-3; *Lofton* v. *Seneca Coal & Coke Co.*, *supra*. It is alleged that such a construction of the statute produces too harsh a result; but the harshness is inherent in the legislation. We see no escape from the statutory language.

The District Court in the same case had previously held:

> This provision of law giving the right to liquidated damages is mandatory and not discretionary. An employee may not bargain this right away. There must be full payment under the statute.
>
> The employee may not give a valid release of his rights against the employer in consideration of receiving payment of an amount less than that provided by statute. *Fleming* v. *Warshawsky*, 123 Fed. (2d) 622; *Travis* v. *Ray*, 41 Fed. Supp. 6; *Campbell* v. *Mandel Auto Parts*, *supra* (47 F. Supp. 576).

The Seventh Circuit Court of Appeals, in *Birbalas* v. *Cuneo Printing Industries, Inc.* held:

The language of the statute and its interpretation by various courts tend toward promulgation of the doctrine that in cases such as this, the liability created by Congress for non-payment of overtime wages and for liquidated damages and attorney's fees may not be compromised; that it is a single and entire cause of action which cannot be discharged or satisfied by paying merely part of it. * * *

If it were possible, we would prefer to sustain the validity of the releases, but no matter how much we may lament the law's harshness, the section appears to be mandatory. Relief from severity must come from the Congress and not from the Court. * * *

Payment of compensation alone to persons endowed with additional rights was not sufficient to satisfy the entire liability (140 F. (2d) 826, 828-829).

In *Strand* v. *Garden Valley Telephone Co.*:

Defendant also resists the action on the ground that the plaintiffs have released and discharged the defendant from liability on the claims for which recovery is sought. An employee under the Fair Labor Standards Act of 1938 may not bargain away such rights as are given by the Act. The right to damages for failure on the part of the employer to pay an employee the minimum wage is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between the parties. To hold otherwise would be an abortion of the intent of Congress, defeat in part the purposes for which the act was passed, and open the way to injustice, if not to fraud * * *. The plaintiff * * * did not have the right under the law to compromise or settle for lesser benefits than the law provides. Such receipt and release or agreement as were executed * * * did not bar recovery in this action. (51 F. Supp. 898, 904.)

In the instant case, the Circuit Court of Appeals held:

> But in *Fleming* v. *Post*, 2 Cir. 146 F. 2d, 441, 443, where this court, adopted the rule later approved in the *O'Neil* case that a release of liquidated damages was invalid, it went on to say definitely that "we should reach the same result if there were here an accord and satisfaction." And no other result would be in keeping with the policy and provision of this Act. For as this court pointed out in *Rigopoulos* v. *Kervan*, 2 Cir. 140 F. 2d 506, 507, 151 A.L.R 1126, the employer's liability for unpaid overtime compensation and liquidated damages in an additional equal amount "is a single and entire liability which "is not discharged in *toto* by paying one-half of it.

While it is true that this Court in *Brooklyn Savings Bank* v. *O'Neil* found as a fact that there was no *bona fide* dispute between the parties therein as to coverage or amount, yet the same public policy considerations which found that the release therein was invalid would dictate that a release obtained as a result of a settlement of a *bona fide* dispute between the parties with respect to coverage would be invalid.

In that case this Court held:

> And not the least effective aspect of the remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to sum left unpaid * * * (Footnote 20). The necessity of prompt payment to workers has long been recognized by Congress as well as by State legislatures * * *
>
> We are of the same opinion that the same policy considerations which forbid waiver of the basic minimum and overtime wages under the Act also prohibit waiver of the right to liquidated damages.

If in the event of a dispute as to coverage, employees can bargain away their statutory liquidated damages under the Act then the legislative intent would be thwarted and defeated inasmuch as the validity of such settlements

would encourage employers to gamble on evading the Act by not making prompt payments since they would not necessarily have to pay an additional equal amount as liquidated damages when they finally pay the basic minimum or overtime originally due. Another very strong motivating factor for employers to delay in making prompt payments would be the fact that if the employees could bargain away their liquidated damages, the employers would save not alone the liquidated damages, but the accrued interest on the basic minimum or overtime originally due when they finally paid it since the item of interest on the unpaid basic minimum or unpaid overtime has been held by this Court to be an element of liquidated damages. *Arsenal Building Corp. v. Meyer Greenberg*, 324 U. S. 697, 89 L. ed. 876.

In the instant case, the employees were deprived of the use of part of their earnings for a period of more than two years without any compensation therefor.

It therefore follows that the legislative intent underlying the Act can only be carried out by the payment of the basic minimum or overtime due together with an additional equal amount as liquidated damages whenever there is a violation of the Act.

In the instant case, the Circuit Court of Appeals held:

> In practical fact the O'Neil case does not offer support for appellee's contention. For there, too, the employer disputed coverage, finally paid the overtime wages due, and forced suit to be brought for the balance. Except for the fact that the present appellee may have been more vociferous in its assertion that its business is local,[4] the facts here are exactly the same as those in the O'Neil case. It may be that, where there is a genuine dispute not as to the law of the Act, but as to facts, such as the amount of labor actually performed, the parties may work out together a fair adjustment of the dispute and that

[4] Even this would seem doubtful.

> it was this type of situation which the Supreme Court wished to reserve for further consideration. But use of a disagreement as to the legal interpretation of the Act, turning upon the nature of the employer's business, as a basis for reducing payments under those required by the Act, appears definitely prohibited by the O'Neil case. See 57 Harv. L. Rev. 257; 55 (fol. 481) Harv. L. Rev. 150; 43 Col. L. Rev. 355, 359; cf. also Dodd, Administration of Workmen's Compensation, 1936, 186 *et seq.* (R. 324, 325).

Petitioner herein as well as petitioner in Brooklyn Savings Bank *v.* O'Neil places much reliance on the fact that other Federal statutes for wages or whose public policy it alleges is similar to the Fair Labor Standards Act permit settlement, or compromise (Pet. Br. 16, 17).

This Court in Brooklyn Savings Bank *v.* O'Neil resolved this issue:

> Petitioner relies on the fact that other Federal Statutes authorizing employees to sue for wages or for damages arising from injuries sustained in the course of employment contained specific provisions prohibiting waiver of rights under the Acts involved or provided means by which compromises and settlements can be approved. The decision in the instant case is based on the legislative policy behind this enactment.

Reference is made in petitioner's brief to the fact that this Court "approved, *per curiam*" stipulations of settlement in *North Shore Corporation, Petitioner* v. *Barnett, et al., id.* v. *Scott, et al.*, 323 U. S. 679 (Pet. Br. 19). In view of the fact, that these stipulations were signed by the attorneys for the respective parties thereto, the Court did not pass on the merits of the issues therein since they had become moot questions.

This Court recently took cognizance of the inherent inhibition against waivers of rights created by statutes affecting the public welfare in *Midstate Horticultural Co.*

v. *Penn. R. R. Co.*, 320 U. S. 356, 88 L. Ed. 83 (1943), when it held:

> Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest * * *. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce. * * *
>
> In view of considerations of paramount public policy no defense of release, accord and satisfaction, settlement or compromise may bar respondent's recovery here.

POINT II

Respondent established coverage under the Act and was entitled to the benefits of the Act.

Section 3 (j) of the Act provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such was employed * * * in any process or occupation necessary to production thereof, in any State."

There is no doubt since the decision of this Court, in *Kirshbaum* v. *Walling*, and *Arsenal Building Corporation, et al.* v. *Walling*, 316 U. S. 517, that maintenance employees of a loft building wherein "large quantities of goods are produced for interstate commerce" are entitled to the benefits of the Act.

In the instant case, the District Court found the salient characteristics of the dress manufacturing industry in New York City to be as follows:

> It appears that the building is tenanted by many persons who serve the dress manufacturing industry. The latter industry, in the City of New York, seems to be organized along the following lines. The dress manufacturer purchases the fabrics and other materials which go into the production of a dress, and usually has the material cut in accordance with his own designs. He maintains a showroom and sales force for the exhibition and sale of his wares. He does not manufacture the dress. The actual work of fabrication is performed by a number of contractors of whom there are several varieties. One variety consists of dress contractors. They employ a force engaged in sewing garments. The second variety consists of contractors who pleat, trim and stitch. Their work is performed upon the garments either before or after they are handled by the dress contractor, as the designs permit. A third variety consists of those who fabricate belts and similar accessories. All the contractors get the fabrics from the manufacturer and return them, after they have received the benefit of their services to the manufacturer. These manufacturers are located within the City of New York. The defendant's building was occupied by many of these several varieties of contractors.

At this point, respondent respectfully calls to the Court's attention that the petitioner's loft building located at 571-583 Eighth Avenue, New York City is in the immediate vicinity of the loft building of the Arsenal Building Corp., the petitioner in *Arsenal Building Corp. et al.* v. *Walling*, which is located at 463 7th Avenue, New York City. That the tenants of both of these loft buildings were engaged in the manufacturing of dresses. Respondent, further, respectfully calls the Court's attention to the undisputed fact that the bulk of the dresses sold throughout the United States emanate from New York

City where there is such a heavy concentration of their manufacture in a particular area that said area is commonly and popularly referred to as the "Garment Center". This district roughly comprises the area bounded on the south by 34th Street, on the north by 40th Street, on the east by the Avenue of Americas, and on the west by Ninth Avenue. Petitioner's loft building was located in the "Garment Center".

Although all of the evidence was before the District Court in the instant case, it did not find it advisable to pass on the question of coverage (R. 314). "In the view I have taken of the defenses of accord and satisfaction and release, I find it unnecessary and indeed inadvisable to pass on the question of coverage except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a *prima facie* case."

In its Findings of Fact and Conclusions of Law (R. 314-319), the District Court made no finding of fact as to coverage except as to the conceded percentages.

Inasmuch as the District Court had made no finding of fact even though all the evidence had been presented to it, the Circuit Court of Appeals made a finding of fact "then from 1940 on more than 20% of the building was occupied by concerns producing goods for interstate commerce" (R. 326). Therefore it alleged that during this period the respondent was covered by the Act (R. 326).

Petitioner in its brief repeatedly alleges that the twelve additional tenants had no knowledge of the ultimate destination of the goods that they produced (Pet. Br. pp. 3, 8, 11, 22). It singles out four of these tenants, Max Schneider, Benjamin Weinstein, Raizer & Trager, and Schrader and Bazarnick as having no knowledge of the ultimate destination of the goods they produced (Pet. Br. pp. 8, 27, 29). It concedes that they "contracted" exclusively for certain manufacturers. Each "manufacturer" that these four tenants "contracted" for shipped their

dresses to points outside the State of New York (R. 207, 224, 230, 244). Each one of the twelve additional tenants served the dress manufacturing industry of New York City.

In *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 92 this Court held:

> The Act extends at least to the employer who expects goods to move in interstate commerce. Ibid. Assuming that such expectation or reasonable basis therefore, was necessary on petitioner's part before the application of the Act to petitioner, it is here present. The records contain ample indication that there were reasonable grounds for petitioner to anticipate at the time of drilling that oil produced by the wells drilled would move into other states. Petitioner closely identified as it is with the business of oil production, cannot escape the impact of the Act by a transparent claim of the ignorance of the interstate character of the Texas Oil Industry.

If, we merely substitute "dress" as the commodity instead of "oil" and the locale as New York instead of Texas, then the above ruling would be directly applicable to the instant case at bar. Every one of the tenants knew or had reason to know that his dresses would be shipped to points outside the State of New York. As the Circuit Court of Appeals in the instant case held "And the testimony clearly shows that at the time of production these tenants had at (fol. 482) the very least reasonable grounds to anticipate that their products would move in interstate commerce" (R. 326).

CONCLUSION

It is respectfully submitted that the decision below was proper and should be affirmed.

Respectfully submitted,

ISIDORE ENTES,
Attorney for Respondent.

Appendix

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U.S.C. Secs. 201 *et seq.*) read as follows:

* * *

Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce:

(1) for a workweek longer than forty-four hours during the first year from the effective date of this seciton,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

Sec. 16 (b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action.